U.S. Department of Homeland Security
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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: SEP 2 9 2006

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IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Mari Johnson

for Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained and the petition will be approved.

The petitioner is engaged in engineering and software development. It seeks to employ the beneficiary permanently in the United States as a mechanical engineer pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. As required by statute, an ETA Form 9089 Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. Upon reviewing the petition, the director determined that the beneficiary did not satisfy the minimum level of experience stated on the labor certification.

On appeal, counsel asserts that the petitioner has established that the beneficiary worked full-time while obtaining his Ph.D. We find that the petitioner has now overcome the director's concerns.

In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. An advanced degree is a United States academic or professional degree or a foreign equivalent degree above the baccalaureate level. 8 C.F.R. § 204.5(k)(2). The regulation further states: "A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree." *Id.*

Citizenship and Immigration Services (CIS) has the authority to evaluate whether the beneficiary is qualified for the job offered.

> [I]t appears that the DOL is responsible only for determining the availability of suitable American workers for a job and the impact of alien employment upon the domestic labor market. It does not appear that the DOL's role extends to determining if the alien is qualified for the job for which he seeks sixth preference status. That determination appears to be delegated to the INS under section 204(b), 8 U.S.C. § 1154(b), as one of the determinations incident to the INS's decision whether the alien is entitled to sixth preference status.

K.R.K. Irvine, Inc. v. Landon, 699 F.2d 1006, 1008 (9th Cir. 1983). The court relied on an amicus brief from DOL that stated the following:

> The labor certification made by the Secretary of Labor ... pursuant to section 212(a)(14) of the ... [Act] ... is binding as to the findings of whether there are able, willing, qualified, and available United States workers for the job offered to the alien, and whether employment of the alien under the terms set by the employer would

> adversely affect the wages and working conditions of similarly employed United States workers. *The labor certification in no way indicates that the alien offered the certified job opportunity is qualified (or not qualified) to perform the duties of that job.*

(Emphasis added.) *Id.* at 1009. The Ninth Circuit, citing *K.R.K. Irvine, Inc.*, 699 F.2d at 1006, revisited this issue, stating:

> The Department of Labor ("DOL") must certify that insufficient domestic workers are available to perform the job and that the alien's performance of the job will not adversely affect the wages and working conditions of similarly employed domestic workers. *Id.* § 212(a)(14), 8 U.S.C. § 1182(a)(14). **The INS then makes its own** determination of the alien's entitlement to sixth preference status. *Id.* § 204(b), 8 U.S.C. § 1154(b). ***See generally K.R.K. Irvine, Inc. v. Landon***, 699 F.2d 1006, 1008 9th Cir.1983).
>
> The INS, therefore, may make a de novo determination of whether the alien is in fact qualified to fill the certified job offer.

Tongatapu Woodcraft Hawaii, Ltd. v. Feldman, 736 F. 2d 1305, 1309 (9th Cir. 1984).

The key to determining the job qualifications is found on ETA Form 9089 Part H. This section of the application for alien labor certification, "Job Opportunity Information," describes the terms and conditions of the job offered. It is important that the ETA Form 9089 be read as a whole. In evaluating the beneficiary's qualifications, CIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. CIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also*, *Madany*, 696 F.2d at 1008; *K.R.K. Irvine, Inc.*, 699 F.2d at 1006; *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

In this matter, Part H, line 6, of the labor certification reflects that 24 months of experience in the job offered is required. Line 10 reflects that 24 months of experience in an alternate occupation, research scientist, would also be acceptable. On Part J, regarding "Alien Information," the beneficiary indicated that he had a doctoral degree and that he had worked as a research scientist for the Institute of Advanced Machinery and Design at Seoul National University from March 1, 1993 through June 30, 2001. The petitioner submitted the beneficiary's Ph.D. in Engineering conferred by the School of Mechanical and Aerospace Engineering at Seoul National University on August 30, 2000. The beneficiary received his Master's degree from the same institution on February 25, 1995. Dr. [redacted], the beneficiary's graduate research advisor, discusses the beneficiary's dissertation, Master's thesis and projects. Dr. [redacted] did not indicate that any of these projects represented work experience separate from the beneficiary's degree requirements. Dr. [redacted] **letter was on the** letterhead of the School of Mechanical and Aerospace Engineering.

In response to the director's request for evidence that the beneficiary has the required 24 months work experience, the petitioner submitted a new letter from Dr. [redacted] asserting that the beneficiary worked at the Institute of Advanced Machinery and Design from March 1993 until June 2001. Dr. [redacted] further asserts that the beneficiary worked 40 hours per week during this time. Once again, Dr. [redacted]'s letter was on the letterhead of the School of Mechanical and Aerospace Engineering. The director concluded that the petitioner had not reconciled the two statements from Dr. [redacted] and questioned whether "a university would employ the beneficiary as a full-time research scientist at a time when he was still pursuing his degrees."

On appeal, the petitioner submits a letter from Professor [redacted], Director of the Institute of Advanced Machinery and Design. This letter appears on the letterhead of the institute. Professor [redacted] confirms that the petitioner worked at the institute full-time from May 12, 1995 to July 11, 2001. The petitioner also submits an invoice of withholding tax for 1997-1998 and pay stubs for 1999 and 2000 confirming that the institute compensated the beneficiary during those years.

We concur with the director that the initial letters were insufficient as they were from the beneficiary's research advisor and not his employer. While both the School of Mechanical and Aerospace Engineering and the Institute of Advanced Machinery and Design are under Seoul National University, the institute, not the school, employed the beneficiary. As such, letters from a professor at the school were insufficient. That said, in submitting the new letter from Dr. Oh, the petitioner made a good faith effort to submit the evidence requested. As such, we will consider the new evidence now submitted on appeal. *Cf. Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988).

The petitioner, however, has now overcome the director's basis of denial by submitting a letter from the beneficiary's employer, the institute, and evidence of wage payments.

The burden of proof in visa petition proceedings remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has sustained that burden.

ORDER: The decision of the director is withdrawn. The appeal is sustained and the petition is approved.